

IN THE HIGH COURT OF SINDH, KARACHI

Before Mr. Justice Ahmed Ali M. Shaikh, C.J.
Mr. Justice Mohammed Karim Khan Agha, J

C.P. No. D-5369 OF 2017.

Shahid Umar

Vs.

The Chairman NAB & others.

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| Date of hearing | 15.09.2017 |
| Date of order | 12.10.2017 |
| Petitioners: | Through Mr. Mohammad Ilyas Khan, advocate |
| Respondents: | Through Mr. Muhammad Altaf, Special Prosecutor NAB alongwith I.O. |

ORDER

Mohammed Karim Khan Agha, J. By this order we propose to dispose of the above mentioned petition for post arrest bail filed by the petitioner (Shahid Umar) which has been pressed by his counsel solely on the grounds of hardship coupled with the rule of consistency.

2. The brief facts of the case are that the petitioner was charged along with 39 other co-accused in National Accountability Bureau (NAB) reference No.27/2015 for acts of corruption and corrupt practices under S.9 of the National Accountability Bureau Ordinance 1999 (NAO) in connection with the Lines Area Redevelopment Project (LARP) which acts of corruption caused a loss of millions of rupees to the national exchequer.

3. Seven of the accused in the reference are Government officials including the petitioner who at the relevant time was

Additional Director Finance LARP whilst the other 32 co-accused are beneficiaries.

4. The petitioner's application for post arrest bail on merits was dismissed by this Court vide order dated 18-12-2015. The petitioner then applied for post arrest bail on hardship grounds due to the prolonged delay in completing his trial which was rejected by this Court vide order dated 31-03-2017 with a direction that the trial court complete the trial within 3 months. This order was appealed to the Hon'ble Supreme Court where a two member bench rejected the same vide order dated 29-06-2017 with a direction to expedite the recording of the witnesses and decide the matter in accordance with the law.

5. Through this petition the petitioner has again applied for bail on the grounds of hardship keeping in view the fact that 3 months had past since this court originally rejected his bail on hardship grounds and the direction to complete the trial within 3 months had not been complied with and it would still take considerable time to conclude the trial.

6. He also placed reliance on an **un reported order of a 3 member bench of the Supreme Court in Civil Petition 17/17 Syed Rashid Hussain Rizvi V Chairman NAB dated 12-7-2017** (approx 2 weeks after the supreme rejected his bail on the grounds of hardship) whereby the Hon'ble Supreme Court granted bail on hardship grounds to another co-accused in the same reference namely accused No.5 Syed Rashid Hussain Rizvi.

7. Thus, since the petitioner has spent more than 2 years in jail and the trial is no where near to completion and his role is on the same footing as accused No.5 in the same reference Syed Rashid Hussain Rizvi who had been granted bail by the Hon'ble supreme court on the grounds of hardship he was also entitled to bail on the grounds of hardship based on the rule of consistency.

8. On the other hand learned counsel for NAB strongly opposed the grant of bail on hardship grounds as a direction to complete the case within a given time was not a new ground for the grant of bail; the petitioner's post arrest bail had been declined on merits; that he was one of the main accused and the loss to the national exchequer was colossal. He placed reliance on a detailed order of another 3 member Bench of the Supreme Court in the unreported case of **NAB V Bakhat Zameen** (CP 1542/2016 dated 26-08-2016) whereby a stricter interpretation of hardship was to be taken in NAB cases and as such the petitioner's application for post arrest bail on grounds of hardship should be dismissed. He also placed reliance on the case of **Nisar Ahmed v. The State & others** (PLD 2016 S.C. 11).

9. We have heard the parties, perused the record and considered the relevant case law on the subject.

10. At the outset we would make it clear that there is no ground for the grant of bail on account of statutory delay in NAB cases as set out in the third proviso of S.497 Cr.PC. If,

however, there was a prolonged delay in a NAB case then the accused could apply for bail on hardship grounds.

11. Firstly we find that non-compliance of a direction given by the High Court to a trial court to conclude a trial within a given period of time **may** not on its own be a fresh ground for grant of bail. In this respect reliance is placed on the case of **Nisar Ahmed v. The State & others** (PLD 2016 S.C. 11) which held as under at para-4 (P.13).

“4. We have scanned the material placed on record and are unable to subscribe to such submissions of the learned ASC. Neither non-compliance of the directions issued to the trial Court to conclude the trial expeditiously or within some specified time can be considered as valid ground for grant of bail to an accused, being alien to the provisions of section 497, Cr.P.C., nor filing of direct complaint will have any bearing as regards earlier bail refusing orders, which have attained finality, unless some fresh ground could be shown by the petitioner for consideration of his request for grant of bail afresh, which is lacking in the present case”.

12. On this ground alone the petition may have been dismissed but we have also in the interests of justice and in our discretionary jurisdiction considered whether this ground could amount to hardship especially as a new ground of the rule of consistency appears to have arisen and the other particular facts and circumstances of the case.

13. Traditionally the superior judiciary has tended to take a stringent view as to what amounts to hardship and hardship cases were classified as being those where there has been a “shocking” or “inordinate” or “repulsive and unconscionable” delay in completing the trial, which often runs into a delay of

a number of years and where there seems little chance of the trial being completed in the near future, as opposed to a lesser degree of delay. For example, in cases such as **Hamesh Khan V NAB** (2015 SCMR 1092 almost 5 years delay), **The State V. Syed Qaim Ali Shah** (1992 SCMR 2192), **Riasat Ali V. Ghulam Muhammad and the State** (PLD 1968 SC 353), **Gul Hasan Penhyar V The State** (1997 SCMR 390 around 6 years delay) **Muhammad Azim V The State** (2009 P Cr.LJ 1314, Kar. Around 6 years delay), **Hashim V The State** (2009 YLR 1777, Kar. Around 6 years delay) **Shah Nawaz V The State** (2010 YLR 3182, Kar. Around 3 years delay) **Anwar Ali V The State** (2002 P Cr. L J 186, Kar. Around 2 years to even frame the charge).

14. Thus, the delay needed to be a long one, through no fault of the accused and anyone acting on his behalf and the trial was not likely to conclude in the near future.

15. Under the NAO as mentioned above there is no provision for statutory bail on account of delay which under S.497 Cr.PC is a right whereas hardship cases are at the **discretion** of the Court based on the particular facts and circumstances of the case. However the Preamble to the NAO provided for the speedy disposal of cases and S.16 (a) NAO in particular provided as under:

“16. Trial of Offences. 1[(a) Notwithstanding anything contained in any other law for the time being in force, an accused shall be prosecuted for an offence under this Ordinance in the Court and the case shall be heard from day to day and shall be disposed of within 30 days.]

16. Perhaps by keeping these requirements of an expeditious trial in view in NAB cases it appears that initially the Superior Courts took a relatively tough view on any delay and was prepared to grant bail in NAB cases even if the delay was for a relatively lesser period of time. For example in the case of **Muhammed Saeed Mehdi V The State** (2002 SCMR 282) it was held that the Supreme Court in NAB cases could grant bail "in appropriate cases". Although this case primarily revolved around bail on medical grounds it held as under at P.288 Para 6 in terms of delay.

"Para 6. We have carefully considered the submissions made by the learned counsel for the parties. The object of a criminal trial is to make the accused face the trial and not to punish an undertrial prisoner for the offence alleged against him. The basic idea is to enable the accused to answer the criminal prosecution against him rather than to rot him behind the bars. It is also well-recognised principle of law that bail cannot be withheld as punishment on accusation of non-bailable offences against an accused. It is also a salutary proposition of law that an accused is entitled to expeditious access to justice, which includes a right to fair expeditious trial without any unreasonable delay. In the instant case, it is admitted that the trial against the petitioner has not commenced for no fault attributable to him. It is undisputed that undue delay has taken place in the commencement of the trial against the petitioners for non-production of co-accused Mr. Shafi M. Sehwan, who has been found to be unable to travel to Attock though it is conceded that he is able to appear before any Court at Rawalpindi. **Be that as it may, the object of NAB Ordinance, as contained in its preamble, inter alia, provides for expeditious trial of scheduled offences within the shortest possible time. This position is reassured in section 16 of NAB Ordinance postulating for day to day trial of the case and its conclusion within the thirty days. Obviously, in the present case such object does not seem to be anywhere near its achievement for the reasons mentioned above.**" (bold added)

17. In the case of **Jamil A. Durrani V State** (PLD 2003 Kar 393) it was held as under at P.398.

"The applicant is in jail for last more than nineteen (19) months and the trial is not within sight of completion in near future. It is cardinal principle of law that bail cannot be withheld as a punishment and nobody can be kept in jail for indefinite period as held in the case of Abdul Qadir (supra), therefore, we feel inclined to hold that under these circumstances a case for grant of bail has been made out."

18. In the case of **Aga Jahanzeb V NAB** (2005 SCMR 1666) the Hon'ble Supreme Court observed as under at P.1167.

"When questioned that under the NAB Ordinance trial is to conclude within 30 days. Mr. M.Ibrahim Satti, Advocate Supreme Court submitted that this time period is not mandatory but directory for the time being we would refrain from expressing any opinion as to whether the timeframe is mandatory or directory, **but would direct that after submission of challan in this case on 7th of May, 2003 if the trial does not commence or conclude within 30 days from the said date petitioner would automatically become entitled to the grant of bail** subject to his furnishing bail bonds in the sum of Rs.five millions with one surety in the like amount to the satisfaction of the trial Court at Lahore."(bold added)

19. In the case of **Muhammed Nadeem Anwar V NAB** (PLD 2008 SC P.645) the Hon'ble Supreme Court held as under at P.649.

"The object of criminal law is to ensure availability of the accused to face trial and not to punish him for offence allegedly pending final determination by a competent Court of law. It is well settled principle of law that grant of bail cannot be withheld as punishment on accusation of non-bailable offence against an accused. **An accused is entitled to expeditious and inexpensive access to justice, which includes a right to fair and speedy trial in a transparent manner without any unreasonable delay. This intention has been re-assured in section 16 of the N.A.B. Ordinance laying down criteria for day to day trial and its conclusion within 30 days. But in the instant case such object does not appear**

likely to be achieved anywhere in the near future and would not constitute a bar for grant of bail to the petitioners. The truth or otherwise of charges leveled against petitioners would only be determined at the conclusion of trial after taking into consideration the evidence adduced by both the parties. It was held by this Court in the case of Aga Jehanzeb v. N.A.B. & others (2005 SCMR 1666) that if trial of case is not concluded within 30 days from date of submission of challan, accused would automatically become entitled to grant of bail" (bold added)

20. It should also be kept mind that these cases were decided **before** the addition of Article 10(A) to the constitution which in effect guarantees the due process rights of an accused which would include the right to an expeditious trial. Article 10 (A) provides as under:

"10(A). Right to fair trial. For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process".

21. In later times it appears that the superior courts including the Supreme Court took a more stringent approach to the grant of bail on hardship grounds and tended to revert back to the more traditional approach of a lengthy delay of many years being involved before the conclusion of the trial.

22. In the case of **Atta Abbass Zaidi V Chairman NAB** (SBLR 2017 1011) of which one of us was a member (Mohammed Karim Khan Agha J) this court attempted to give some considerations/factors as to when it may be "appropriate" for bail to be granted in NAB cases on hardship grounds bearing in mind that the grant of bail on account of hardship was a **discretionary ground** in the following terms at P.1023 Para 20.

20. Although, as indicated above, no hard and fast rule can be set out as to what might amount to a hardship case in NAB cases, as opposed to other criminal cases where statutory bail on the ground of delay is applicable, as each case will depend upon its own particular facts and circumstances we have in determining whether the instant case is a hardship case been mindful of the following in exhaustive considerations/factors.

- (a) the time spent in custody without completion of the trial.
- (b) that delay in the completion of the trial should not have been caused by any fault of the accused or someone acting on his behalf.
- (c) the right to an expeditious trial without undue delay as guaranteed by Article 10(A) of the Constitution especially bearing in mind the Preamble to the NAO requiring speedy trials and S.16(a) of the NAO which requires trials to proceed on a day to day basis and be completed within 30 days
- (d) that as pointed out by the Hon'ble Supreme Court in the recent case of **Ziaghham Ashraf V. State** (2016 SCMR 18) that if an accused is acquitted at trial then no reparation or compensation can be awarded to him in respect of the time he has spent in jail. It is lost time which may have been spent with his family or in other useful pursuits.
- (e) whether there was a reasonable chance of the trial being completed within 6 months of the date of this order which might justify giving appropriate directions to the Accountability Court rather than enlarging the accused on bail.
- (f) whether the charge had been framed yet.
- (g) whether a majority of the PW's had at the time of hearing the petition been examined.
- (h) how many PW's were left to be examined
- (i) whether there were more than 7 accused left in the reference.
(some of the original accused may have entered into plea bargain or been declared proclaimed offenders.)
- (j) whether the loss to the exchequer had been made up or otherwise how substantial was the loss bearing in mind the time already spent in jail.
- (k) whether the post arrest bail of the accused had been declined on merits

- (l) whether the accused was the main accused in the case
- (m) whether the accused was of an advanced age
- (n) whether the accused suffered from any serious medical conditions.
- (o) the general principle that bail should not be withheld as a punishment.
- (p) the chances of the accused absconding and/or interfering with witnesses if he is enlarged on bail
- (q) whether the accused has been convicted before under any Anti corruption legislation or entered into a plea bargain or voluntary return.
- (r) whether the circumstances leading to the delay could be said to amount to an abuse of the process of law
- (s) And finally in our constitutional and discretionary jurisdiction under A.199 of the Constitution the requirement that we do complete and substantial justice.

23. In the above case of **Atta Abbas Zaidi** (Supra) in which the petitioner was also accused No.4 in the same reference as the petitioner in this case despite the petitioner only spending 14 months in jail this court granted him bail on hardship grounds after taking into account all the above considerations/factors for the reasons in para's 26 and 27 of the order as set out below;

"26. The next issue is whether any other of the above mentioned considerations/factors can be pressed into service to justify this being a hardship case despite the petitioner only having served 14 months in jail. Of the other factors the main ones which weigh against him are that he appears to be one of the main accused, post arrest bail has been denied to him and the loss to the exchequer is very large.

27. On the other hand and which is of greater concern to us is that within this 14 months period only one out of 10 PW's have been examined and there are 38 accused. We have seriously

considered this aspect of the case i.e. delay in framing of the charge and only 1 out of 10 PW's being examined so far along with potentially 38 accused which could amount to 38 separate cross examinations by different lawyers of each remaining witness and consider that in the light of A.10 (A) of the Constitution, the preamble to the NAO and S.16 (a) NAO, the medical condition of the petitioner that on balance especially due to the large number of accused and potential cross examinations that realistically in our view there are hardly any chances of this case being completed in the near future as would justify a direction to complete the trial within 6 months as realistically speaking it appears that the trial may yet take at least a year to complete if not much longer. As such based on the above discussion, although bail on the grounds of statutory delay is not open to the petitioner, in the interests of justice we consider that the petitioner has made out a case of bail on hardship grounds. In our view A.10 (A) of the Constitution which includes the right to an expeditious trial should be meaningful and should be fully applied in order to protect an under trial prisoner from prolonged periods of detention during his trial due to no fault of his own. A.10 (A) of the Constitution cannot be seen as a "paper" or "illusionary right" but rather a live, practicable and enforceable right".

24. This court considered that the above order struck a fair balance in determining the factors/considerations in hardship cases in NAB matters whilst exercising its discretion bearing in mind that even a murderer can be granted statutory bail as of right provided that the requirements of S.497 Cr.PC are met and he may be subject to the death penalty on conviction compared to a maximum sentence of 14 years in jail in NAB cases whilst accepting that corruption is a serious crime and a major menace to society.

25. In essence we therefore identified the key factors as being the length of time already spent in jail by the petitioner with no fault being caused on his part and how much longer

the trial was realistically likely to take to conclude based on the particular facts and circumstances of the case

26. After the above decision **Atta Abbass-Zaidi** (Supra) it appears that in the case of **NAB V Bakhat Zameen** (CP 1542/2016 dated 26-08-2016) a 3 member bench of the Hon'ble supreme Court through a detailed and reasoned judgment seemed to have reverted back to a more stricter interpretation of what amounted to prolonged delay in a NAB case for it amount to a hardship case in the following terms;

"Through this petition, the Chairman, NAB has sought cancellation of bail granted to the respondent No.1 by the Peshawar High Court, Peshawar vide its impugned order dated 03.03.2016, passed in Writ Petition No. 3447-P/2015.

2. We have heard the arguments of learned Special Prosecutor NAB on behalf of the petitioner and learned ASC for respondent No.1. The perusal of material placed on record reveals that respondent No.1 is the only nominated accused in Reference No.3 of 2015, under section 18(g), read with section 24 of the National Accountability Ordinance, 1999 (hereinafter referred to as the "Ordinance of 1999"), submitted by the Director General, NAB before the Administrative Judge, Accountability Courts, KPK Peshawar on 09.1.2015, wherein on 04.02.2015 he has been charged as under:-

"Firstly that you in connivance with others prepared 09 (nine) bogus stamp papers of rent agreements for a period of three years commencing from 2008 to September 2011 with M/s. Jan & Bangash Hotel Kohat Road, Peshawar claiming thereby a payment of Rs. 2,43,71,712/- that trainees in the said hotel stayed only for four months at the actual monthly rent of Rs.5,00,000/- including bus charges and that you accommodated students at small houses in different areas of the city at nominal rents and thus misappropriated an amount of Rs. 1,76,71,254/- in the head of accommodation.

Secondly that you in connivance with your co-accused Ali Akbar, Younas Shah (who entered into

plea-bargain with the NAB Authorities) and Nasim Jan (who became approver and was granted conditional pardon) also prepared bogus invoices of J&S Enterprises. Irshad Traders and Yasir Enterprises claiming expenditure of Rs. 1,39,62,027/- but you cannot justify the amount spent on these fake invoices that your liability after deducting the liability of your co-accused comes to Rs. 1,18,67,723/- in the head of procurement.

The vocational training part of the FRDP was outsourced by Project Director to you through Memorandum of Understanding (MOUs) and amount was released in full to your account but you misappropriated / embezzled the fund and caused a total loss of Rs. 2,95,38,977/- to the Government and you thereby committed the offence of corruption and corrupt practices within the meaning of section 9(a)(vi) of the National Accountability Ordinance, 1999 punishable under section 10 of the said Ordinance and schedule thereto and within my cognizance."

3. The plea for grant of bail on merits raised by respondent No.1 in his earlier Writ Petition No.3545-P/2014 was rejected by the High Court vide its order dated 28.4.2015, which is available at Pages 19 to 23 of the Court file and speaks for itself. On 10.10.2015, another petition under Article 199 of the Constitution for grant of bail was moved by respondent No.1 on the ground of statutory delay. The learned Division Bench in the Peshawar High Court, while admitting respondent No.1 to bail through the impugned order, noted down that the respondent No.1 has remained in custody since 15.9.2014 and during this period the prosecution has only examined 14 out of 31 witnesses, while during ten months period of trial, respondent No.1 has obtained only six adjournments. Thus, he was entitled for grant of bail on the ground of statutory delay of over one year, as the offence for which he was charged was not punishable with death penalty.

4. Before revering to the facts of the case as regards delay or otherwise in the proceedings of the trial before the Accountability Court and the merits of the findings of the learned Division Bench recorded in the impugned order, **we would like to make it clear that the provisions of section 497, Cr.P.C. are not as such applicable for the purpose of grant of bail to an accused facing charge/trial under the Ordinance 1999. However, in appropriate cases, the question of**

delay in the conclusion of trial, depending upon the facts and circumstances of each case on its own merit, has been considered by the superior Courts on the yardstick of hardship vis-à-vis scheme of Articles 4 and 15 of the Constitution. Thus, *ipso facto*, application of principles for grant of bail embedded in section 497, Cr.P.C, including the provision of statutory delay, is devoid of any legal force.

5. Reverting to the facts of the present case, we have noticed that the observations of the learned Division Bench that respondent No.1 has been attributed only six adjournments during the ten months period of trial before the Accountability Court, is result of patent misreading of record, inasmuch as from the perusal of Court diaries of the Accountability Court, which have been placed on record on behalf of the petitioner, through C.M.A. No.4807/2016, it is evident that after framing of charge on 04.2.2015, from 06.2.2015, respondent No.1 has been instrumental in seeking adjournments on 16.12.2015, 25.2.2015, 06.4.2015, 20.6.2015, 13.7.2015, 28.8.2015, 09.9.2015, 22.9.2015, 20.10.2015, 29.10.2015, 06.11.2015, 19.11.2015, 01.12.2015, 12.12.2015, 02.1.2016, 27.1.2016, 18.2.2016 and 29.2.2016 (i.e. eighteen dates of hearing). Not only this, but even after grant of bail through the impugned order, he continued with such practice by seeking adjournments on 15.3.2016, 30.3.2016, 18.5.2016 and 02.6.2016, while order sheets of subsequent dates are not available before us. **It will not be out of context to mention here that even otherwise the practice of making mathematical calculations, for ascertaining the actual period of delay attributable to the prosecution or the accused for the purpose of computing the period of statutory delay has not been approved by this Court, as even delay on few dates of hearing at the instance of an accused can be fatal for this purpose, irrespective of the actual time wasted on that account. More particularly in the cases where accused is being tried under the Ordinance 1999, which is a special law and specifically bars grant of bail to an accused by virtue of its sections 3 and 9(b), which respectively read as under:-**

Section 3:

"The provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force."

Section 9(b):

"All offences under this Ordinance shall be non-bailable and, notwithstanding anything contained in section 426, 491, 497, 498 and 561A or any other provision of the Code, or any other law for the time being in force no Court shall have jurisdiction to grant bail to any person accused of any offence under this Ordinance."

6. **The above discussion clearly goes to show that grant of bail to respondent No.1 through impugned order of the learned Division Bench of the Peshawar High Court, Peshawar is result of misreading of record of the proceedings before the NAB Court as well as erroneous understanding of relevant provisions of law in this regard. Thus, mere fact that in case an accused has remained in custody for a period of 13 months will not be sufficient to hold that it is a case of hardship within the parameters as defined by this Court in this regard in the various earlier pronouncements. For further guidance in this regard, reference can be made to the cases of Khan Asfandiyar Wali v. Federation of Pakistan (PLD 2001 SC 607) and Himesh Khan v. The National Accountability Bureau, Lahore (2015 SCMR 1092). (bold added)**

27. Thus, it appeared that the considerations/factors to be considered in hardship cases in **Atta Abbass Zaidi's case** (Supra) had to a certain extent been overruled by the Hon'ble Supreme Court. In fact in the case of **Syed Rashid Hussain Rizvi V State** (CP.D3614/16) by order dated 29-11-2016 (unreported) this court declined bail to another of the accused in the same reference as **Atta Abbas Zaidi's case** (Supra) largely on account of the Supreme Courts later ruling in **NAB V Bakhat Zameen** (Supra).

28. Once again however following **NAB V Bakhat Zameen's case** (Supra) the Supreme Court seems to have now turned to a broader interpretation of granting bail in NAB cases on the grounds of hardship based on factors which are more in line

with **Atta's Abbass Zaidi's case (Supra)** as opposed to the traditional ground of **many years** in jail having been served and there being no prospect of the trial concluding in the near future.

29. For example, in the following orders;

ORDER 03.03.2017 by a 2 member bench of the Supreme Court.

"Petitioner who is facing Reference No.31 of 2016 in Accountability Court-III, Lahore when failed to get the concession of bail from the lower forum sought indulgence of this Court therefore on the ground that none of the assets is disproportionate to his known means but unfortunately none of the documents explaining them has been read in its correct perspective **and that he has been in jail for one year yet the Reference awaits conclusion.**

2. The learned Special Prosecutor appearing on behalf of NAB contended that as many as eight witnesses have been examined and that if a month or so is given to the NAB, the trial will stand concluded. He, however, seriously disputed the assertion of learned ASC for the petitioner that the assets of the petitioner are not in disproportionate to his known assets.

3. We have gone through the record carefully and considered the submissions of learned ASC for the petitioner as well as the learned Special Prosecutor, NAB.

4. **Without entering into the merits of the case lest it prejudices the stance of either of the parties, the very fact that the petitioner has been in jail for one year yet his trial has not been concluded despite there being no lapse on his part. Needless to say speedy trial is an indefeasible right of the accused particularly in the cases of NAB when Section 16 of the NAO provides that trial shall be concluded within 30 days. (bold added)**

For the reasons discussed above, we convert this petition into appeal, allow it and direct release of the petitioner on bail if he furnishes bail bonds in the sum of rupees five million with two sureties to the satisfaction of the trial Court.

30. As mentioned earlier and relied upon by the petitioner **unreported order of a 3 member bench of the Supreme Court in Civil Petition 17/17 Syed Rashid Hussain Rizvi V Chairman NAB dated 12-7-2017** where at Para 5 it held as under:

“A look at para-8 and para-9 of the reference would reveal that role assigned to the petitioner is not much different from the one assigned to his co-accused who has since been released on bail. We thus, see no strong reason to treat the petitioner differently. **The fact that the petitioner has been in jail for two years yet the conclusion of his trial is not in sight would tilt in favour of grant rather than refusal of bail**”
(bold added)

31. The significance of the above order is that it arose out of a case (**Syed Rashid Hussain Rizvi**) whereby this court had **set out in full the detailed 3 member Bench judgment of the Supreme Court in NAB V Bakhat Zameen's case** (Supra) and as such in passing the above order the 3 member Bench of the Hon'ble Supreme Court was well aware of the **NAB V Bakhat Zameen's case** (Supra) and as such appears to have declined to follow it based on the particular facts and circumstances of the case. Admittedly a part of the bail was based on the rule of consistency **but the other part was based on hardship.**

32. Perhaps this change in approach is guided by Article 10 (A)'s requirement of an expeditious trial, the fact that the NAO is special law whose object is speedy disposal of cases within fixed timeframes and the realization that the ground reality is that in NAB cases due to their complexity, there being so many accused (often upwards of 10) each with a separate

right of cross examination of usually many witnesses often through separate advocates such trials can often take 5 or more years to complete with a maximum sentence of 14 years and the object of the criminal law primarily being to allow persons to face the trial against them and not to let them rot in jail for years on end in cases where they may be acquitted at the end. Thus, since there is no statutory grounds of bail in NAB cases in terms of hardship the supreme Court may be turning towards a more lenient and humane approach in determining hardship cases in NAB cases based on the ground realities that these cases even after several years often realistically have no hope in sight of being completed in the near future due to some of the factors mentioned above and as such the Court is taking a more human approach in NAB cases bearing in mind that it is for the prosecution to expeditiously prosecute its case and for the trial court to manage the smooth running and fast and efficient disposal of NAB cases in accordance with the NAO **provided that the accused or his representative has not been at fault in delaying the trial.** Corruption may be a heinous crime which is eating away at the fabric of society and hindering economic development but it should not permit the State to lock accused up in jail for years on end without determining their guilt, time which the accused cannot recover. A balance needs to be struck between the heinousness of the offense and the liberty of the accused who cannot be detained indefinitely as was held in the classic case of **Riasat Ali V Ghulam Muhammed** (PLD 1968 SC 353) which seems to

have been one of the foundational cases on the grounds of hardship. Such intervention by the courts in such NAB hardship cases may even be perceived as the court's acting in their discretionary constitutional jurisdiction to safeguard/protect the fundamental rights of a citizen who has been in prolonged detention pending completion of his trial due to no fault of his own against the failure of the State to expeditiously prosecute him. If such NAB trials are taking so long to complete due to no fault of the accused it is not for the accused to be made to suffer prolonged incarceration due to the fault of the State in any civilized society but for that State to sort out the shorting comings in the criminal justice system so that the accused is not unnecessarily made to suffer due to the State's failure. In such cases for example by creating more accountability courts to deal with the heavy work load so that cases can be heard more frequently and decided more speedily as was the intention of the legislature which is made abundantly apparent through both the preamble and S.16 (a) NAO requiring trials to be heard on a day to day basis and decided within 30 days. Every thing of course, however, in a hardship cases will turn on the particular facts and circumstances of each case and as such the **Atta Abbas Zaidi** (Supra) considerations/factors may prove to be useful in making such determinations.

33. Thus, it would almost seem that we are back to the **Atta Abbas Zaidi** (Supra) considerations/factors in NAB cases for the grant of bail on hardship grounds the main ones being the length of time spent in jail, whether any delay has been

caused by the fault of the petitioner and based on the particular facts and circumstances of the case realistically how much longer is the trial likely to conclude and whether a direction to complete the within 6 months would enable the trial to conclude.

34. In this respect we would re-iterate the following para's of **Atta Abbas Zaidi's case** (Supra) at Para's 29 to 33:

"29. Before parting with this order we would like to observe that what appears to be the most troubling aspect of this case is that the charge was only framed on 16-04-2016 i.e. only 4 months ago (and 10 months after the arrest of the petitioner) and only one of the 10 PW's have so far recorded their evidence. There also appears to be around 38 other co-accused. It may be, as indicated from the record, that some of the other co-accused have or may enter into plea bargains however that is still likely to leave a very large number of co-accused all of whom are likely to engage separate lawyers which is likely to lead to a large number of separate cross examinations for each PW which is likely to be extremely time consuming. With accused's lawyers being busy before superior courts, accused not being produced from custody, lawyer's strikes, illness of accused and lawyers, PO's on leave, the heavy work loads of the Accountability Courts, countless miscellaneous applications to decide etc when all added together tend to suggest a trial which has the potential to become unnecessarily prolonged and may impinge on the right of the accused to an expeditious trial under A.10 (A) of the Constitution and hence our above decision to grant post arrest bail on the grounds of hardship.

30. In particular we have observed in numerous NAB cases, which have come before this Court, that there are usually at least 10 accused (some of whom may already be in custody) and it usually takes the Accountability Court around 4 to 6 months or on occasion even longer to deal with the pre trial procedures under S.87 and 88 Cr.PC before the charge can even be framed. This can hardly be called expeditious justice especially bearing in mind the requirements of the Preamble of the NAO providing for speedy trials, S.16 (a) NAO and A.10 (A) of the Constitution and indeed could be deemed to be a failure in the Accountability process before the Courts whereby trials which are meant to be completed within 30 days are taking, in some cases, up to 5 years to complete with on occasion a few of the accused remaining behind bars during most of this period.

31. In our view in order to ensure expeditious trial of NAB cases before the Accountability Courts, as was the intention of the NAO and the command of A.10(A) of the Constitution, the time has now come for the NAB to consider seriously the number of accused whom it is essential to be included in a reference as accused as opposed to witnesses, the number of PW's it is necessary to call at trial (some of whom may be given up during the course of trial), the number of documents which are required to be exhibited in order to prove its case to the required standard and better case management whereby PW's are present on each and every date along with the required documents and IO's are present if required.

32. Likewise the Accountability Courts need to consider how they can best expedite trials through, for example, resort to S.17 © NAO whereby novel methods may be employed to shorten the usual procedural formalities before the trial can commence and even for shortening the duration of the trial once the charge has been framed provided that A.10 (A) of the Constitution is not infringed. Early separation of trial from absconders should be considered. Starting the evidence a fresh once an absconder is brought before the Court only seems to have the effect of unnecessarily prolonging the trial which would not seem to be in consonance with the letter and spirit of S.16 (a) NAO. Unnecessary adjournments should not be allowed. Could affidavits in evidence of PW's be resorted to subject to cross examination so as to avoid a lengthy examination in chief? The Accountability Court Judges also need to employ better and more efficient trial management.

33. Even the competent authorities may consider creating additional accountability courts, where necessary, in order to reduce backlogs and expedite the trials under the NAO so that accused do not languish behind bars for overly long periods of time before their case is decided. The accused who are in custody should not be made to suffer prolonged imprisonment or be penalized further because of a lack of capacity to deal with cases under the NAO (especially as the accused at the end of a prolonged trial may be acquitted and every accused is presumed to be innocent until proven guilty). In our view it is the obligation of the State to ensure that such a situation is avoided and the constitutionally guaranteed rights of its citizens are upheld.

35. In the case before us the petitioner has been in jail for 2 years and 3 months and he has been responsible for about 4 delays in the proceedings. There are more than 30 accused, at least 5 witnesses yet to be examined and a battery of lawyers

for the accused to cross examine each PW with the last witness taking approximately 5 months alone to complete his evidence in chief and cross examination and as such in our view realistically the trial is most likely to take a significant period of time to conclude. More importantly two of the other co-accused having a similar role as the petitioner have both been granted bail on hardship grounds one of which was based on the earlier reproduced order of the Supreme Court. Thus, keeping in view the rule of consistency and the discretionary powers of this court to grant bail in appropriate cases including hardship cases the petitioner is hereby granted bail on hardship grounds however due to the large loss caused to the exchequer (as with co-accused Atta Abbas Zaidi which arises out of the same reference and as a matter of consistency) subject to him furnishing two solvent sureties each in the sum of RS2.5 (two and a half million) and PR bonds in the like amount to the satisfaction of the Nazir of this court. The petitioner shall also surrender his original passport to the Nazir of this Court. Secretary Ministry of Interior Government of Pakistan is directed not to issue the petitioner with any fresh or duplicate passport. A copy of this order shall be sent to secretary Ministry of Interior for compliance. It is made clear that the NAB are free to move this court for cancellation of this bail granting order if the petitioner or through anyone acting on his behalf causes any delay in the completion of the trial.